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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 12

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Appellant,

vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, AND MILWAUKEE ROAD COMMUTERS' ASSOCIATION,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

MOTION TO AFFIRM.

LATHAM CASTLE,
Attorney General of the State of Illinois,
HARRY R. BEGLEY,
Special Assistant Attorney General,
160 N. La Salle Street,
Chicago 1, Illinois,
Attorneys for the State of Illinois and Illinois Commerce Commission.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 307.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Appellant,

vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, AND MILWAUKEE ROAD COMMUTERS' ASSOCIATION,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

MOTION TO AFFIRM.

Now comes the appellees, State of Illinois and the Illinois Commerce Commission, and pursuant to Rule 16, paragraph 1 (e) of the Revised Rules of the Supreme Court, respectfully move that the judgment of the District Court be affirmed on the ground that the questions raised by the appellant are so insubstantial as not to need further argument.

STATEMENT OF THE CASE

As appellant's Jurisdictional Statement relates, this is a direct appeal from the judgment of a statutory three-Judge District Court entered June 14, 1956, pursuant to 49 USCA 17(9) and 28 USCA 2321-25, which set aside, annulled and permanently enjoined the enforcement of an order entered by the Interstate Commerce Commission pursuant to an investigation under Section 13(4) of the Interstate Commerce Act, 49 USCA 13(4), in a proceeding entitled "Chicago Intrastate Suburban Fares of the Milwaukee Road."

On July 24, 1952, the Milwaukee Railroad filed with the Illinois Commerce Commission a petition to discontinue all of its off peak suburban trains and requested an increase in suburban fares on the remaining trains of approximately 33⅓%, or in the alternative, if the discontinuance of trains was denied, that the suburban fares be raised approximately 73⅓%. The railroad claimed an out-of-pocket deficit in the Chicago suburban operations of approximately $1,260,000. In the evidence introduced by the railroad before the Illinois Commission, no claim was made for any depreciation or maintenance of way as constituting a part of the out-of-pocket expense. The evidence before the Illinois Commission, in the extended hearings which were held, developed that the operating expenses of the Milwaukee Railroad were somewhat overstated and that by converting the suburban operation from steam to diesel locomotives the railroad could save approximately $1,000,000 annually which would eliminate any deficit on the suburban service. Consequently, the Illinois Commission on November 10, 1954, by an appropriate order, denied any fare increase to the Milwaukee Railroad.[1]

(1) The railroad had by the end of September 1954 completely dieselized the suburban operation. The report of the Interstate

The rates thus left in effect by the order of the Illinois Commission were as high or higher than the rates for diesel operated service on the Burlington and Rock Island Railroads, but were somewhat lower than those on the electrified service of the Illinois Central and South Shore and the steam locomotive service of the North Western.

Following the denial of any increase by the Illinois Commission, the Milwaukee Railroad filed, in February 1955, a petition with the Interstate Commerce Commission under Section 13 of the Interstate Commerce Act, requesting that Commission to authorize an increase in the suburban intrastate fares upon the basis that the present intrastate fares constituted an undue burden on interstate commerce. In the proceeding before the Interstate Commission, the railroad introduced different evidence and claimed as part of the out-of-pocket expense on the suburban operation, depreciation and maintenance of right-of-way which had not been claimed or introduced before the Illinois Commission.

On November 21, 1955, the Interstate Commission issued its report (297 ICC 353, appendix C of Statement) prescribing an increase in the intrastate suburban fares.[2]

The report found that the railroad had an out-of-pocket deficit of $306,038 on the suburban operation and then prescribed fares which should (based on the 1954 movement) result in an increase in revenue of $383,000, "which would eliminate the out-of-pocket deficit and result in a contribution to indirect costs and taxes, of approximately $77,000

Commission, after allowing depreciation and maintenance of way expense of over $250,000, determined that the railroad's out-of-pocket expense was only $306,038. Thus, the Interstate Commission's report of November 21, 1955 confirmed the finding of the Illinois Commission that dieselization would save approximately $1,000,000 yearly.

(2) Some of the prescribed fares were substantially higher then even those proposed by the Railroad. See Table 1 of the appendix to the Commission Report.

annually." At the same time the report found that the Milwaukee Railroad earned from its freight operations $37,393,050 (both interstate and intrastate) and suffered a deficit from its passenger operations of $22,824,532 (mostly interstate). *Not one word is found in the report concerning the railroad's revenues* (other than suburban revenue) *nor any finding or subsidiary statement regarding the contribution that the suburban service should make as its fair proportionate share to the railroad's income.*

After overruling petitions for rehearing and reconsideration, the report was made final by order entered March 2, 1956, ordering the higher prescribed fares to become effective on April 20, 1956. (Appendix E of Statement.)

On April 13, 1956, the State of Illinois, Illinois Commerce Commission and the Milwaukee Road Commuters' Association filed an action to review the Interstate Commission's report and order pursuant to 28 USCA 1336. The statutory three-Judge District Court after full briefs and the presentation of oral arguments concluded that the order of the Interstate Commission was not supported by the requisite findings required to support its order and that the evidence failed to support the finding that the intrastate fares which were prescribed will be just and reasonable for the future.

ARGUMENT.

The decision of the District Court does not present any substantial question warranting further argument which would necessitate the devoting of additional time by the Justices of this Court. The matter pertains to an essentially local situation which has been amply heard and decided by a unanimous three-Judge District Court.

A reading of the District Court's opinion[3] clearly shows that the court properly reviewed the report and order of the Interstate Commission in the light of the pronouncements of this court in *King* v. *United States*, 344 U. S. 254; *North Carolina* v. *United States*, 325 U. S. 507; *Florida* v. *United States*, 282 U. S. 194; *Wisconsin RR Com.* v. *Chicago, B. & Q. RR Co.*, 257 U. S. 563; and the more recent decisions of *Mississippi Public Service Com.* v. *United States*, 124 F. Supp. 809, aff'd. 349 U. S. 908 and *State of North Carolina* v. *United States*, 128 F. Supp. 718, aff'd. 350 U. S. 865.

This case, as the Commission's report clearly discloses, is not a "persons or localities" discrimination but one of alleged revenue discrimination. The District Court analyzes the report and states (1) that the Commission completely ignored the controlling inquiry of what contribution from the intrastate traffic would constitute a fair proportion of the railroad's income, (2) that the making of a contribution to indirect costs and a return on investment after paying all out-of-pocket costs is not the same as a contribution of the intrastate's fair proportionate share, (3) that the evidence fails to support the finding that the

(3) Not yet reported, but found at pages 14-24 of Appellant's Statement.

prescribed rates will be just and reasonable, and (4) that the incomplete showing made to the Illinois Commission should not be allowed as the key to opening the door to the Interstate Commission. From that analysis the lower court concludes and its judgment is simply that the "justification for the exercise of the federal power to nullify state rates does not clearly appear from the record before us."[4] As was recently stated, it is the lower court's *judgment* and not the particular statements made in the opinion, that this court reviews. *Black* v. *Cutter Laboratories*, 351 U. S. 292, 297.

Appellant states in its Jurisdictional Statement that seven questions are presented, but only proceeds to discuss five as supposedly being substantial. It is to those five points that we now address ourselves and demonstrate that they are without substance.

I.

The District Court did not invalidate the order of the Interstate Commission because of the failure of the carrier to first seek relief from the State Commission. Actually, the railroad did come to the state body. The criticism by the District Court lay not in failing to apply in the first instance to the State Commission, but in the manner in which that application was presented.

While the District Court's opinion sets aside and enjoins the Commission's order for the basic reason that the order lacks the necessary findings and the evidence fails to support the reasonableness of the prescribed rates, the court quite properly questioned the procedure followed by the

(4) As this court stated in *North Carolina* v. *United States*, 325 U. S. 507 at 511: "Before the Commission can nullify a state rate, justification for the 'exercise of the federal power must clearly appear.'"

railroad and correctly holds that the State Commission should be given a chance to fix fares on the same evidence and basis as the Interstate Commission and that Section 13(4) does not contemplate the State Commission as being merely a "way station".

Every case must rest upon its own particular facts and situation. It must be remembered that a state's power over intrastate rates is exclusive to the point of actual discrimination and not until that point is reached does the Interstate Commission's jurisdiction take hold. *North Carolina* v. *United States*, 325 U. S. 507, 511. If this initial exclusive authority is of any value or is to receive more than mere lip service, it must follow that the State Commission should be afforded the opportunity to look at the same picture that the carrier presents to the Interstate Commission.

It is clear that the instant matter is factually outside the scope of the language and opinion in *State of North Carolina* v. *United States*, 128 F. Supp. 718, 724, affirmed 350 U. S. 805 and *State of Illinois* v. *United States*, 101 F. Supp. 36, 47, affirmed 342 U. S. 930. In the *North Carolina case* the question was whether the jurisdiction of the Interstate Commission was prevented until "remedies under state law had been exhausted." In the *Illinois case* it was whether the pendency of "a suit in the local courts in the State of Illinois to set aside a report and order of the Illinois Commerce Commission which refuses to permit the Illinois Central Railroad Company to make any changes or increases in its presently existing suburban fares" prevented the jurisdiction of the Interstate Commission under Section 13(3) and (4). Both opinions dealt with the exhaustion of the state remedy. Such is not the present situation.

Whether this Court in *Florida* v. *United States*, 282 U. S.

194, 210, in using the language quoted by the appellant in its Statement meant "exhaustion of state remedy" or used that language to emphasize the fundamental power of Congress to authorize the Interstate Commission to establish intrastate rates in removing discrimination, we do not know. However, we do know that this Court also stated in that same opinion, at page 212: "The Commission has no general authority to regulate intrastate rates" and again at page 214: "The authority to determine the reasonableness per se of intrastate rates lay with the state authorities and not with the Interstate Commerce Commission." If any effect is to be given to these latter statements of this Court or to the very language of Section 13(3) requiring rates to be "made or imposed by authority of the State," the State Commission must be accorded the initial right to fix those intrastate rates.[5] Is that right a substantial one or merely fictitious? If it is substantial, then the State Commission has the right to the same evidence and the presentation of a case upon the same basis as the Interstate Commission. Otherwise a carrier could file a reduced intrastate rate with the State Commission, which naturally would be allowed without suspension or hearing, and then go to the Interstate Commission to have it set aside as constituting a discrimination against interstate commerce. *Florida* v. *United States* (*supra*) must be confined to the particular factual situation therein presented and is not contrary to the factual case decided by the District Court in the instant matter.

As the District Court remarks, even the Interstate Commission felt some compunction over the difference in presentation as its report added: "This explains, but does not excuse, its (the railroad's) incomplete showing before

(5) Some states have maximum intrastate rates set by Statute so that if that maximum is already in effect, it would be useless to go to the State Commission and the law does not compel a useless act. That is not, however, the situation in Illinois.

the Illinois Commission." A full examination of the District Court's opinion clearly demonstrates that appellant's first alleged point is without merit.

II.

Appellant's second alleged question of substance is directed to the District Court's opinion that there is insufficient evidence to support the finding that the rates prescribed will be just and reasonable.[6] A finding that the prescribed rates will be just and reasonable is necessary, *Mississippi Public Service Com.* v. *United States*, 124 F. Supp. 809, aff'd. 349 U. S. 908, and the report actually made such an ultimate finding.[7] However, the Court observed that the attempt in the Commission's report to sustain the reasonableness of the prescribed rates by comparing them with the North Western was inadequate, both in fact and in substance, when the evidence on the point was examined.[8]

(6) The opinion had already found that the Commission's order lacked the basic findings for exercising federal jurisdiction and while the court could have stopped there since it was not required to examine the evidence in the absence of a basic finding to support the order, *Florida* v. *United States*, 282 U. S. 194, 215; *United States* v. *Chicago, M. St. P. & Pac. R. Co.*, 294 U. S. 499, 505, yet it was altogether fitting and customary for the court to examine another point raised by the parties.

(7) A finding that the prescribed rates are just and reasonable actually becomes necessary only after the exercise of federal jurisdiction is justified. When the Interstate Commission justifiably assumes its power to remove discrimination, such rates as it may prescribe must also be just and reasonable.

(8) The court's opinion states that the Commission completely ignored the controlling inquiry of: "what contribution from the intrastate traffic would constitute a fair proportion of the railroad's income." A report, based upon substantial evidence, which clearly found what increased amount would constitute a fair proportionate contribution, thus creating a basis for exercising federal power to remove an interstate discrimination, would in turn probably support a finding as just and reasonable such rates as would make that contribution."

It is conceded by the appellant that no evidence was offered showing similarity of equipment, service or operating conditions between the Milwaukee Railroad and the North Western. As the lower court observed, the record actually shows that the lines are not comparable and even the railroad's attorney had stated, "we do not offer these North Western fares as criteria of what our fares should be." Yet the railroad now urges upon this Court the hue and cry that the lower court's decision makes impossible uniform fares and could disrupt the passenger and freight rate structures of the entire country. The record, as well as the Interstate Commission's report, shows that there was no uniformity of passenger rates in the suburban area of Chicago prior to this case and no uniformity even after the Commission's report.[9] Consequently, the lower court's opinion cannot cause any disruption of uniformity where none exists.

Even the Interstate Commission itself—as the lower court pointed out—recognizes that there must be some similarity of operation to justify comparability of rates. *Commutation and Multiple Fares Between Illinois and Wisconsin*, 288 I. C. C. 45. The Illinois Supreme Court aptly stated the proposition in *Moline Consumers Co.* v. *Com. Com.*, 353 Ill. 119 at page 126:

> "This court has held that a similarity of conditions of operation must be shown before comparison of existing transportation charges can have probative value in determining what rates are reasonable."

The judgment and statements of the lower court must be reviewed in the light of the factual situation presented. When so considered there is no substance to Appellant's second contention.

(9) There are seven railroads having substantial suburban service in the Chicago area: Rock Island, Burlington, Illinois Central, South Shore, North Shore, North Western and Milwaukee.

III.

The amount of contribution from intrastate traffic which would constitute a fair proportionate share of the carrier's total income is a finding which is basic and necessary in all alleged revenue discrimination cases. Such finding is lacking in the present case.

The one thing that always stands out in any examination of this court's opinions (including *King* v. *United States*) and of the lower courts which have been affirmed by this Court is that the Interstate Commission must make a finding, which has to be supported by the evidence, that the intrastate rate does "*not contribute its fair share of the earnings required*" to provide the transportation service, both interstate and intrastate. As said by Chief Justice Taft in *Wisconsin* v. *Chicago, B. & Q. RR. Co.*, 257 U. S. 563 at 586: "intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system," and reiterated by a unanimous court through Chief Justice Hughes in *Florida* v. *United States*, 282 U. S. 194 at 211:

> "As intrastate rates and the income from them must play a most important part in maintaining such a system, the effective operation of the Act requires that *intrastate traffic should pay 'a fair proportionate share'* of the cost of maintenance." (Emphasis added.)

And *King* v. *United States*, 344 U. S. 254, *does not hold that such a finding is unnecessary*, but on the contrary reaffirms the requirement: In that case this court in distinguishing the *North Carolina case*[10] said at page 270:

> "The finding which was *primarily needed, and was there found lacking*, was one that the intrastate service at 1.65 cents per mile *did not contribute its fair share* * * *." (Emphasis added.)

(10) 325 U. S. 507.

and then at page 275:

> "In the instant case the Commission does not rely upon the mere disparity between the intrastate and interstate rates. *On the contrary*, the Commission states that the Florida intrastate rates "*are abnormally low and are not contributing their fair share* * * *".'' (Emphasis added.)

In the case at bar, there is *no* finding, nor is there any evidence for such a finding if one were attempted, of the amount which the intrastate suburban fare should contribute in order to produce its "fair proportionate share" of the revenue necessary for maintaining the Milwaukee's transportation service. In fact, as before stated, there is no finding as to the Milwaukee's total revenues so as to form any basis for a determination that the $1,800,000 of suburban revenue fails to constitute its fair proportion of the railroad's revenues. The Commission's order which the District Court set aside has the skimpiest of findings and is based almost entirely on the conclusory findings of undue discrimination to support the exercise of the Interstate Commission's authority. Even in the *King case* (344 U. S. at 269) it was held that the ultimate jurisdictional findings must be supported by adequate subsidiary findings based upon the evidence. Such subsidiary findings, which would show that the increase in intrastate fares ordered by the Interstate Commission constitute no more than a fair proportion of the Milwaukee's income, are completely lacking in the order set aside by the District Court. The only findings, if the recitals in the Commission's report are considered to be findings, are that the suburban service suffers a deficit of $306,038; that the increased fares ordered by the Commission should produce $383,000 which "would eliminate the out-of-pocket deficit and would result in a contribution to indirect cost and taxes of approximately $77,000 annually," and "to the extent that

this suburban service fails to meet the out-of-pocket cost and make all the contribution that it reasonably can to respondent's indirect costs, it increases respondent's passenger deficit and results in an undue burden upon its freight operations, state and interstate." While making these recitals the order likewise finds that the Milwaukee Railroad suffered a deficit from its passenger operations of $22,800,000 while it earned from its freight operations $37,393,000, *such freight earnings being from both intrastate as well as interstate.* Again, so far as the report shows, the interstate passenger revenue could be zero so that any increase in suburban revenue would naturally reduce the total passenger deficit, but does that show a failure of *proportionate contribution?* The report of the Commission completely fails to accord any effect to the legal requirement that intrastate rates need only to contribute their proportionate share and because that "primarily needed" finding was "found lacking" the District Court properly set aside and annulled the Commission's order.

The findings and the report made by the Interstate Commission in the instant case are comparable to those in the *North Carolina case* (325 U. S. 507) and not to those made by the Commission in the *King case.* In the *King case* the Commission found that the increased intrastate rates "will constitute not more than a fair proportion of respondent's total income" (Finding 6—278 I. C. C. 73) and that finding was backed up by subsidiary findings supported by the evidence, while in the instant case the Commission's report finds that prescribed fares will "make a fair contribution towards respondent's indirect costs and return on investment" (Finding 4). As the District Court correctly observed, a fair proportion to a carrier's total income is not the same as paying all expenses of the particular service plus making a contribution to indirect costs and return.

We again reiterate, there is not a single finding or statement as to the Milwaukee's total revenue—merely the total passenger deficit ($22,800,000) and total freight net profit ($37,393,000).

Nor is there anything in *State of Illinois* v. *United States*, 101 F. Supp. 36, affirmed 342 U. S. 93, or in *State of North Carolina* v. *United States*, 128 F. Supp. 718, affirmed 350 U. S. 805 which change the fundamental principle that a finding of the proportionate share which the intrastate needs to contribute is a prerequisite to a valid order. Not only were the ultimate findings in the *Illinois case* somewhat different (there were person-locality discriminations) but there was a specific subsidiary finding to the effect:

> "The fares approved herein will yield a return after taxes of about 3.2 per cent, and an average increase of about 20 per cent or $1,300,000 per annum, *which we find to be the approximate measure of the revenue discrimination* against interstate commerce resulting from petitioner's present multiple and commutation fares." 281 I. C. C. 552. (Emphasis added.)

In the *North Carolina case* the Interstate Commission not only found that the intrastate rates "imposed by authority of the State are abnormally low; and * * * fails to produce its fair share of the earnings required" but also found that the "rates result in undue preference of and advantage to persons and localities in North Carolina in intrastate commerce and undue prejudice of and disadvantage to persons and localities in interstate or foreign commerce" (Findings 3 and 4, 128 Fed. Supp. at p. 721).

Thus, it is clear there is no substance to the Appellant's position that the District Court fails to follow the decisions of this Court.

IV.

There was no substantial evidence which had any probative value sufficient to support a finding of reasonableness of the prescribed rates. Such evidence as the high cost of suburban operation, the unfavorable transportation characteristics of the suburban service and other matters offered can not, *per se*, sustain the assumption of jurisdiction by the Interstate Commission which is a prerequisite to any prescription of intrastate rates. The fact that intrastate rates on the suburban service "were not remunerative or reasonably compensatory" does not establish the justification for the exercise of the federal authority. *Florida* v. *United States*, 282 U. S. 194, 214.

Moreover, the Interstate Commission's justification for the prescribed rates was not based upon the high cost of the suburban service, nor on the unfavorable transportation characteristics of that operation, but rather, on the basis that the suburban service should "make all the contribution that it reasonably can." The Commission's report bluntly takes the position that suburban fares should be fixed on the basis of "how much will the traffic bear" because any less amount "increases respondent's passenger deficit." In other words, wherever there is a deficit on interstate—and practically every railroad has an interstate passenger deficit—the Interstate Commission could increase some particular intrastate fare (such as the captive commuter group) to the highest level that could be exacted regardless of any consideration to such group's "fair proportionate share" to the carrier's revenue.

The District Court refused to approve this "give till it hurts" doctrine and citing *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 483, held that the carrier could not justify intrastate rates on the basis of alleviating the interstate passenger deficit. In this, the District Court was correct and Appellant's position is insubstantial.

V.

There is no substance to Appellant's fifth contention. *First*, Appellant did not think it substantial enough to join with the United States and Interstate Commission in the latters' motion to have the lower court correct its order to eliminate from its scope the interstate fares. *Second*, the only interstate fares attempted to be fixed by the order were those for Zenda and Walworth, Wisconsin which the Milwaukee Railroad claims are part of its suburban territory, although there is only one suburban train in the morning and one in the evening which stop at those stations. *Third*, the report itself shows that the interstate fares for Zenda and Walworth were not fixed or determined by the Commission as a separate matter, but were determined solely on the basis of the prescribed intrastate suburban fares,[11] and when the basis for the intrastate fares fell so also the basis for the two incidental interstate fares. Consequently, the District Court was correct in setting aside and annulling the entire Commission order.

CONCLUSION.

For the foregoing reasons, we respectfully submit that the decision of the District Court is correct and this appeal presents no substantial question for this court's determination. We believe that the "scrupulous regards for the rightful independence of state governments" which deters federal courts from enjoining state regulatory bodies (*Alabama Commission* v. *Southern Railway Co.*, 341 U. S. 341, 349) should equally operate to deter the Interstate Commission from using its authority to grant the extraordinary relief of a Section 13(4) petition unless the burden or

(11) Finding 5 of the report states: "That respondent's interstate suburban fares on the same basis as herein prescribed for intrastate application will be just and reasonable for the future.

discrimination on interstate commerce is manifestly evident. The judgment of the District Court is simply that the justification for the exercise of federal power does not clearly appear and upon the facts in the instant case the court was correct in this determination and its judgment should, accordingly, be affirmed.

Respectfully submitted,

LATHAM CASTLE,
Attorney General of the State of Illinois,

HARRY R. BEGLEY,
Special Assistant Attorney General,
160 N. La Salle Street,
Chicago 1, Illinois,
Attorneys for the State of Illinois and Illinois Commerce Commission.

September 7, 1956.